Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling	)	WT Docket No. 16-421

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

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COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association ("CCA") hereby submits comments in response to the Public Notice[1] in the above-captioned proceeding seeking comment on the need to streamline small wireless facilities infrastructure siting procedures at the state and local levels. CCA also comments on the Petition for Declaratory Ruling submitted by Mobilitie, LLC[2] covered by the Public Notice. In addition, CCA takes this opportunity to address more broadly the siting issues that plague competitive carriers when seeking to deploy towers, small wireless facilities, and fiber, thereby stifling competition to the ultimate detriment of consumers. CCA agrees with the Federal Communications Commission ("FCC" or the "Commission") that small cell and distributed antenna systems ("DAS") deployment is needed to address escalating consumer

[1] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, DA 16-1427, WT Docket No. 16-421 (rel. Dec. 22, 2016) ("Public Notice").

[2] Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) ("Mobilitie Petition").

demand for mobile data, and to support "5G"[3] and next-generation services to "meet localized needs for coverage and increased capacity in outdoor and indoor environments."[4] Fiber and tower deployment, however, are also vital to meet consumer and technological demands, especially for rural and regional carriers. Finally, CCA agrees that the Commission possesses the regulatory tools to address antiquated, ill-conceived and often noncompliant state and local siting procedures, and urges the Commission to move quickly to clear the way for broadband infrastructure deployment.

I. INTRODUCTION AND SUMMARY.

In 2017, broadband connectivity is critical to participate meaningfully in modern American and international society. Connectivity is the common thread in day-to-day economic, education, healthcare, public safety, and social engagement. Therefore, the Commission and Congress are right to prioritize infrastructure deployment issues. The Commission has successfully completed reverse and forward auction bidding of the Incentive Auction, releasing 84 megahertz of needed low-band spectrum into the broadband marketplace.[5] The Commission must now focus its attention on the buildout challenges of deploying that spectrum to meet growing mobile usage demands.

[3] Public Notice at 2 n. 4 ("5G refers to the 5th generation of wireless technologies; requirements for these technologies are projected to be set by standards bodies by early 2017 with specifications to follow by 2020").

[4] *Id*. at 1.

[5] *See Clearing Target of 84 Megahertz Set for Stage 4 of the Broadcast Television Spectrum Incentive Auction; Stage 4 Bidding in the Reverse Auction Will Start on December 13, 2016*, Public Notice, DA 16-1354, WT Docket No. 12-269 (rel. Dec. 9, 2016).

Mobile data traffic will continue to grow at a rapid clip, from an estimated 5.1 Gigabits per smartphone each month in 2016 to 25 Gigabits by 2022.[6] It will not be easy, but competitive carriers will meet these capacity demands by adding or refarming spectrum, and deploying new antennas and connecting to fiber to maximize the use of that spectrum.[7] Each network "generation" transition has created a massive influx in jobs and economic stimulus.[8] The same

[6] *See* Public Notice at 3 (citing Ericsson, Ericsson Mobility Report at 12 (Nov. 2016), https://www.ericsson.com/assets/local/mobility-report/documents/2016/ericsson-mobility-report-november-2016.pdf). Mobile data use grew 63 percent in 2016, and 18-fold over the last five years; mobile traffic is expected to increase seven-fold over the next five years. *See Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021 White Paper*, CISCO (Feb. 9, 2017).

[7] *See, e.g.*, Dr. John Saw, *Sprint's Unlimited customers can be confident in our ability to keep meeting their demand for data now and in the future,* SPRINT (Feb. 15, 2017) (describing Sprint's innovative approach to providing gigabit LTE and 5G using 2.5 GHz spectrum and Time Division Duplex ["TDD"] LTE). When moving forward in this proceeding, the Commission should also take the opportunity to streamline fiber deployments, recognizing its role in powerful new 5G services. *See* Aaron Pressman, *Verizon Gets Federal Okay for Key Piece of 5G Strategy*, FORTUNE.COM (Nov. 17, 2016) ("But because 5G signals do not carry as far as current wireless networks, Verizon says it will need to add many more cellular base stations, each of which needs to be connected to wired networks and the Internet via fiber optic cables"). Further, accommodating consumer demand and fulfilling the FCC's statutory mandate to "facilitate the deployment of network facilities needed to deliver more robust wireless services . . . throughout the United States" also denotes traditional deployments to support broadband networks, especially in rural areas experiencing next-generation service for the first time. *See* Public Notice at 2.

[8] In 2012, the benefits of 4G were estimated to be so great—"a 10 percentage point gain in penetration of a new generation of wireless technology in a given quarter leads to a 0.07 percentage-point gain in employment in the following quarter and continuing gains in subsequent quarters"—that one study estimated any national job creation strategy "should include or encourage appropriate measures to accelerate the deployment of 4G infrastructure." Further, "[t]he adoption of cell phones and other mobile devices supported by a shift from 2G to 3G Internet and wireless network technologies led to the creation of nearly 1.6 million new jobs across the United States, between April 2007 and June 2011 – even as total private sector employment fell by nearly 5.3 million positions." *See* Robert J. Shapiro & Kevin A. Hassett, *The Employment Effects of Advances in Internet and Wireless Technology: Evaluating the Transitions from 2G to 3G and from 3G to 4G* (January 2012),

will be true for 5G, except the growth will be exponential as compared to past network generations. The buildout of these networks will be a boon for the economy. One study estimates that as much as $275 billion will be invested over the next seven years; $93 billion is expected to be spent on construction, with the rest allocated toward network equipment, engineering, and planning.[9] This buildout is also expected to create up to three million jobs, encompassing approximately 50,000 jobs per year in construction alone.[10] Once these networks are in place, they are expected to create 22 million jobs, and produce up to $12.3 trillion of goods and services by 2035.[11] Smaller and more remote communities may have the most to gain: in areas where network construction creates first-time broadband users, the U.S. could see "an additional $90 billion in GDP, and 870,000 in job growth."[12] And in "small to medium-sized cities with a population of 30,000 to 100,000," 5G deployment could create, respectively, "300 to 1,000 jobs" per city.[13] To maximize these benefits, the Commission must move promptly to address the siting challenges of these networks.

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http://www.sonecon.com/docs/studies/Wireless_Technology_and_Jobs-Shapiro_Hassett-January_2012.pdf.

[9] Accenture Strategy, *How 5G Can Help Municipalities Become Vibrant Smart Cities*, 3 (rel. Jan. 12, 2017), https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf.

[10] *Id.* at 4.

[11] *Landmark Study on Impact of 5G Mobile Technology Released*, QUALCOMM (Jan. 17, 2017), ("The 5G value chain itself is seen as generating up to $3.5 trillion in revenue in 2035, supporting as many as 22 million jobs. Over time, 5G will boost real global GDP growth by $3 trillion dollars cumulatively from 2020 to 2035, roughly the equivalent of adding an economy the size of India to the world in today's dollars").

[12] *Id.*

[13] *Id.*

Competitive carriers play a significant role in deploying broadband infrastructure, and their success directly benefits America's economic health and competitive strength.[14] Considering the complexity and costs associated with the multitude of siting practices, these comments address each in step, focusing first at the state and local levels as highlighted in this proceeding.

CCA members' experience with state and local siting is, with few exceptions, marked by unreasonable delays, inflated fees unconnected to actual administrative or human resource costs, and a total disregard for "shot clocks" and review timelines. A common refrain among CCA members is their struggle to secure timely approval from state and local entities that do not understand, or will not acknowledge or enforce, the applicable federal requirements. Localities often enforce poorly-drafted policies, many imposing fees unrelated to the actual cost of application review or any ongoing maintenance work on an approved site.

As a result of these barriers, CCA members have employed different strategies to move forward with next-generation network deployment. For example, one regional carrier is developing deployment plans for small cells, wireless local loop, and fixed wireless and last-mile fiber replacement for its 5G infrastructure deployment. This carrier expects to conduct trials of these technologies, in both populous and rural areas, from various vendors during 2017 with the intent of rolling out commercial products by 2018. The 2018 deployments are targeted to address areas in a southern state where wireless equipment would be the cost-effective method to

[14] *See* Comments of CTIA—The Wireless Association, WT Docket No. 16-421, 3 (filed Jan. 11, 2017) ("DAS and small cell facilities provide substantial benefits to both urban and rural consumers. In addition to increasing coverage and providing much needed capacity in urban areas, low-powered technologies such as DAS and small cells provide carriers with lower-cost options for increased deployments in rural areas, which in turn increases competition in rural markets").

deliver advanced services, and with regard to small cells, where occasional mobile user densities require supplementing existing mobile broadband coverage (*e.g.*, college football stadiums, high-traffic areas during rush hour, shopping centers). As a way to move the project forward, the CCA member has chosen to engage state legislators alongside concrete preparations to break ground and actually deploy; even though some local siting rules are less than ideal, the member made a business decision to deploy networks as quickly as possible. Other members elected to focus energy and resources on working with state legislators to standardize siting application fees and procedures, especially in states comprising many small counties with disparate siting rules.[15] One CCA member has deployed only DAS cells, and is hoping to deploy small antennas under a set of clear statewide siting codes, which will make siting timelines and costs more predictable. Another member in the design phase of its first small cell projects is in the process of determining whether the project is feasible under multitudinous local code. Competitive carriers continue to face broadband deployment barriers that are often tied to the type of spectrum they hold; this is especially true when deploying high-band spectrum in rural areas.[16]

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[15] For example, competitive carriers successfully pursued passage of S.B. 1282, which was passed by the Virginia General Assembly on March 20, 2017. S.B. 1282 provides a uniform procedure for siting small cell facilities on existing structures in public rights-of-way. The measure also addresses certain restrictions by localities and the Department of Transportation regarding the use of public rights-of-way or easements. *See, e.g.,* S.B. 1282, *available at:* https://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+SB1282ER.

[16] *See, e.g.,* Letter from Trey Hanbury, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-269, 6-7 (Apr. 23, 2015) ("[T]he number of base stations required to provide service and, thus, the deployment expenses for any given area, vary dramatically by frequency band. T-Mobile, for example, has more cell sites in operation nationwide than Verizon and almost as many as AT&T, despite covering a smaller geographic footprint and holding less spectrum on a MHz-pops basis than either of the two dominant carriers. T-Mobile must deploy more sites to cover a smaller area (at greater cost) because of the propagation characteristics of its primarily mid-band spectrum holdings. . . . only those few carriers with significant low-band spectrum holdings are widely deploying networks in rural areas"); *see id.* at 7 ("Sprint has also studied the network deployment costs associated with

As evidenced by these examples, state and local siting requirements too often slow deployment significantly or halt broadband projects entirely. Even though some states and localities act promptly and correctly, the aggregate impact of those that do not greatly stifles deployment by carriers of all sizes, and cries out for informed Commission action to reduce state and local barriers to broadband deployment.[17]

As described in the Public Notice, dense small cell and DAS[18] deployments are required to accommodate explosive consumer demand for faster, more data-intensive mobile services. Building on the Commission's past good work on wireless siting issues,[19] and in light of next-

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different spectrum bands. It found that build-out requirements using high-band spectrum were up to 13 times higher in rural areas, resulting in enormous cost differentials for carriers and a competitive advantage for established providers") *citing* Lawrence R. Krevor et al., *The Imperative for a Weighted Spectrum Screen: Low-, Mid-, and High-Band Frequencies Are Not Free Substitutable Market Inputs*, attached to Letter from Lawrence R. Krevor, Vice President, Sprint Corp., to Marlene H. Dortch, Secretary, FCC, Docket No. 12-269 (rel. Apr. 4, 2014).

[17] *See* Ex Parte Letter from Cathleen A. Massey, Vice President, Federal Regulatory Affairs for T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421 (filed Feb. 21, 2017) (discussing "T-Mobile's support of the Commission's efforts to streamline wireless facility siting, including the proposals in [the]…Public Notice").

[18] *See* Public Notice at 3 n.16 ("Small cells are low-powered wireless base stations that function like traditional cell sites in a mobile wireless network but, typically, cover targeted indoor or localized outdoor areas ranging in size from homes and offices to stadiums, shopping malls, hospitals, and metropolitan outdoor spaces. DAS networks use numerous antennas (DAS nodes), similar in size to small cells that are connected to and controlled by a central hub. Antennas and associated equipment deployed at each small cell site or DAS node are physically much smaller than those at a macrocell site and do not require the same elevation; therefore, they can be placed on light stanchions, utility poles, building walls and rooftops, and other small structures either on private property or in the public rights of way without creating the visual and physical impacts of macrocell towers").

[19] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd. 13994 (2009) (*"*2009 Declaratory Ruling"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd. 12865 (2014); Erratum, 30 FCC Rcd. 31 (2015)

generation technology preparations, the Commission can exercise its authority under Sections 253 and 332(c)(7) of the Communications Act ("Section 253" and "Section 332", respectively)[20] and Section 6409(a) of the Spectrum Act ("Section 6409") to reduce siting barriers to such deployment.[21] Specifically, CCA urges the Commission to take the following actions:

First, the Commission should take steps to reduce siting permit delays. It can do this by shortening review period "shot clocks" attached to a "deemed granted" provision. This will encourage both competitive carriers and local authorities to be more efficient and accountable throughout the permitting process, and a "deemed granted" provision will ensure local authorities cannot delay a project without proper justification. The Commission should also explore new application processing procedures tailored to small wireless facilities, such as applying a "shot clock" to a single application for multiple small cells or DAS.

Second, the Commission should address the unreasonable fees assessed on siting applicants. CCA members struggle with arbitrarily high siting fees charged by state and local authorities that are discussed at length in the Mobilitie Petition. CCA urges the Commission to limit siting fees to reasonable review costs and any costs of managing rights-of-way ("ROWs"), while disallowing franchise fees. CCA supports Mobiltie's request that the Commission specifically disallow arbitrarily disparate fees for different siting applicants, and require local and state authorities to make public siting fees.

(*"2014 Infrastructure Report and Order"*), *aff'd Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[20] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, §§ 101, 704 (codified as 47 U.S.C. §§ 253, 332(c)(7)).

[21] *See* Middle Class Tax Relief and Job Creation Act of 2012, H.R.363 ("Spectrum Act"), Pub. L. 112-96, 126 Stat. 156, § 6409(a) (2012) (codified at 47 U.S.C. § 1455(a)).

Third, in addition to exercising its statutory authority to reduce delays and fees, CCA recommends that the Commission conduct an educational campaign to reach out to state and local entities with information regarding the benefits of next-generation wireless service. The Commission should also issue infrastructure-related law and policy guidance for states and localities that explains how existing regulatory and legislative rules should be implemented, and perhaps some best practices. CCA believes that the Commission's guidance on these subjects will be well-received by states and localities, who, in members' experience, have many questions about small wireless facilities and the admittedly complex web of regulations attached to siting review.

Fourth, CCA urges the Commission to resolve the confusion produced by conflicting Federal Circuit Court interpretations of Sections 253 and 332. In particular, the Commission should clarify key terms and common language within both Sections 253 and 332, particularly which practices may "prohibit or have the effect of prohibiting" service.[22] This certainty will assist states and localities, either for review or while drafting local codes, as well as carriers creating deployment plans.

Last, the Commission should harness industry-wide energy to address infrastructure issues related to tribal review and matters which may require concurrent Congressional action. In particular, the Commission should undertake comprehensive process reform of the Section 106 review required under the Historic Preservation Act and streamline the environmental review process.

[22] 47 U.S.C. §§ 253, 332.

II. THE COMMISSION SHOULD REDUCE UNNECESSARY DELAYS IN THE STATE AND LOCAL SITING PROCESS.

Unnecessary delays are endemic to state and local siting procedures, and threaten the success of broadband deployment projects. Competitive carriers have come to expect that siting a single cell can drag on for years, as noted in the Public Notice.[23] The Commission can fulfill its statutory mandate to enable broadband deployment by shortening existing "shot clocks" or designated review windows, to 30 days for collocations and 75 days for other permits. To maximize the utility of a shot clock, the Commission should put a "deemed granted" remedy in place, approving any application not finally resolved within the "shot clock" time interval. CCA also encourages the Commission to develop a "batch" review procedure for approving small cell and DAS deployments, by which states and localities can approve deployment for a large number of small cells location in a geographic area.

A. The Commission Should Shorten Review Period "Shot Clocks".

The Commission should exercise its Section 332 authority to shorten existing shot clocks to 30 days for collocations and 75 days for other permits.[24] Given the changing technological landscape trending toward small cell and DAS deployment and collocations since the 2009 Declaratory Ruling and 2014 Infrastructure Report and Order, the Commission is justified in tightening siting application review shot clocks by more narrowly interpreting "reasonable period of time" under Section 332(c)(7)(B)(ii). For clarity and more certainty, the Commission

[23] *See* Public Notice at 7; *see also* Colin Gibbs, *Small cells: Still plenty of potential despite big challenges*, FIERCEWIRELESS (Sep. 1, 2016).

[24] The 2009 Declaratory Ruling provides that a "reasonable period of time" under § 332(c)(7)(B)(ii) is presumptively 90 days for state or local governments to process collocation applications and presumptively 150 days to process all other applications. 2009 Declaratory Ruling ¶ 45.

should declare that Section 332 applies to all state or local siting decisions "regarding the placement, modification, and construction" of personal wireless facilities, including requests to site wireless facilities in a ROW. The Commission also should clarify that Section 332, including shot clocks established thereto, applies to siting requests on municipal poles or ROWs, and not only local zoning decisions. Resolving these points of confusion will quiet litigation and ensure that the Commission implements policies most useful to broadband deployment.

CCA member experiences also underscore the need to address harmful local practices with respect to initial gating decisions under Section 6409(a), which establish a 60-day window for local entities to determine whether a siting permit application is an Eligible Facilities Request for modifications to existing wireless towers or base stations that does not "substantially change" the physical dimensions of the involved towers, base stations, or antennas.[25] For example, CCA

[25] *See* Section 6409(a) ("[A] State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station"); *see also* 2014 Infrastructure Report and Order ¶¶ 265-66, 270-72 (clarifying that state or local government agencies may review siting applications for up to 60 days to decide whether the application involves an "eligible facilities requests" under § 6409(a)(2). An application is "deemed granted" if an agency fails to make such a decision within that time period). The FCC held that "a modification to a non-tower structure that would increase the structure's height by more than 10% or 10 feet, whichever is greater, constitutes a substantial change under Section 6409(a)." *Id.* ¶ 193. Additionally, "a modification substantially changes the physical dimensions of a tower or base station if it meets any of the following criteria: (1) for towers outside of public rights-of-way, it increases the height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for those towers in the rights-of-way and for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater." *Id.* ¶ 188. In Bedford County, VA, a member submitting siting applications for LTE upgrades was required to pay fees and accept delays while an outside consultant reviewed the siting application package, to make a simple Section 6409(a) ruling. Montgomery County, VA, simply will not accept responsibility to implement Section 6409, full stop. Worse, Montgomery County may require sites previously approved with height or flush mounting conditions to secure Special Use Permit approval; such a Special Use Permit demands several public hearings, which this member estimates will delay approval by three to six months.

members report that many localities do not properly implement Section 6409(a), or, if the relevant rules are duly followed, localities purposefully toll the shot clock for as long as possible; some localities will send back an application after 30 days as a matter of course, merely to delay the application process. CCA members explain that some local authorities require additional, unnecessary procedures and impose size requirements on eligible facilities which may require "special exemption" permitting and new fees.[26]

The Commission should also create shot clocks for processing environmental assessments ("EAs") and environmental disputes. Some local reviewing entities draw out review time, and ramp up fees and tangential requirements, without justification and at times with full knowledge of the intent and letter of applicable federal law. The Commission should not allow these practices to continue unchecked.

B. The Commission Should Adopt A "Deemed Granted" Remedy.

The Commission should adopt a "deemed granted" provision, whereby a siting application is deemed granted by operation of law if a state or locality fails to complete review within a shot clock review period. A "deemed granted" backstop facilitates good business practices that ultimately benefit the public interest and competition in the mobile ecosystem. Indeed, knowing when a particular application will be resolved enables competitive carriers to deploy infrastructure more effectively and efficiently by allowing for allocation of capital, material, and human resources in a more organized, predictable fashion. The Commission has recognized these benefits. Chairman Pai, then a Commissioner speaking at CCA's 2016 Annual Convention in Seattle, WA, remarked that although the FCC had already established a shot clock

[26] Member experience working with various counties in the Commonwealth of Virginia typifies problematic Section 6409(a) implementation, or lack thereof.

for wireless infrastructure applications, "[w]e should give our shot clock some teeth by adopting a 'deemed-granted' remedy, so that a city's inaction lets that company proceed,"[27] a sentiment also expressed in his comprehensive Digital Empowerment Agenda[28] and at the most recent hearing convened by the Senate Committee on Commerce, Science, & Transportation entitled "Oversight of the Federal Communications Commission."[29] CCA agrees with Chairman Pai and the implications he identified: even the most clearly-articulated shot clock is undercut where a reviewing local entity can flout it without consequence. Importantly, carriers do not have statutory leave to sue an entity until a "final" decision is rendered,[30] and, therefore, a local entity can bring deployment projects to a standstill indefinitely.[31] By adopting a deemed granted provision, the Commission can provide certainty to competitive carriers and help spur the buildout of networks to the benefit of consumers.

[27] Remarks of FCC Commissioner Ajit Pai at CCA's 2016 Annual Convention, Seattle, WA (rel. Sep. 21, 2016).

[28] Remarks of FCC Commissioner Ajit Pai at The Brandery, "A Digital Empowerment Agenda", Cincinnati, OH (rel. Sep. 13, 2016).

[29] *Oversight of the Federal Communications Commission Before the U.S. Senate Committee on Commerce, Science, & Transportation*, 115th Cong. (Mar. 8, 2017) (statement of Ajit Pai, Chairman, Fed. Commc'ns. Comm'n.).

[30] *See* Public Notice at 6 ("Pursuant to Section 332(c)(7)(B)(v), a person adversely affected by a state or local government agency's 'final action' or 'failure to act' on a personal wireless service facilities siting application 'within a reasonable period of time after the request is duly filed' may sue such an agency 'in any court of competent jurisdiction').

[31] This policy itself gives rise to further inequities, as competitive carriers—especially the smallest—have fewer resources to litigate than dominant providers.

C. The Commission Should Require States and Localities to Process "Batch" Small Cell Applications.

Perhaps the easiest reform discussed in the Public Notice, the FCC should require states and localities to allow "batch" small antenna and DAS applications which will facilitate fast approval of small cell and DAS collocation siting applications. As the Commission indicated in the Public Notice, small cells "have less potential for aesthetic and other impacts than macrocells" and therefore warrant different treatment.[32] The Commission should designate a number of antenna or facilities that could be approved as part of "one" application per a given geographic area, perhaps on a quarter-mile basis.

III. THE COMMISSION SHOULD ADOPT SAFEGUARDS TO REDUCE APPLICATION AND USE FEES.

CCA members agree with Mobilitie: excessive and unfair fees for use of ROWs is a nationwide issue and is stalling broadband deployment. CCA urges the Commission to clarify "fair and reasonable," "competitively neutral and nondiscriminatory" fees to promote faster broadband deployment.[33] Local and state authorities routinely charge siting application fees far above the cost of application review and site maintenance. These fees significantly raise deployment costs, sometimes rendering uneconomic otherwise beneficial projects, harming consumers and economic growth. These high fees not only burden competitive carriers individually, but have an anti-competitive effect by disproportionately burdening smaller

[32] *See* Public Notice at 12.

[33] *Id.*; *see* 47 U.S.C. § 253(c) (providing that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.").

carriers. While the largest carriers are rightfully frustrated by shouldering inflated fees, competitive carriers simply cannot afford to do so and must shape deployment plans accordingly.

A. The Commission Should Limit Siting Fees to the Cost of Application Review and Site Maintenance.

The FCC should grant Mobilitie's request for the Commission to interpret "just and reasonable compensation" under Section 253 as limiting fees to: (1) recover reasonable costs of reviewing and issuing permits; and (2) managing ROWs.[34] The Commission should declare unlawful and preempt fees that are in excess of reasonable costs and designed only to raise revenue. CCA members, large and small, with nationwide and rural footprints, constantly encounter exorbitant fees that bear no connection to the costs of review. For example, the Virginia Department of Transportation has charged approximately $24,000 in fees for siting at a single location. One CCA member noted that fees tend to be higher, and less reasonable, when a city or county hires a consultant to handle the permit process, rather than processing applications in-house. In this type of case, the carrier is typically asked to pay upfront fees, which must be deposited into an escrow account that is drawn upon as the consultant reviews, and requires additional funding if the account gets too low, resulting in consulting fees of up to $10,000 per application, for new towers. Local and state authorities should not be able to charge tens of thousands of dollars without tying the fees to the reasonable costs of application review and site maintenance. This type of fee structure leads to delayed and unnecessarily expensive tower siting, borne mostly by consumers and competition.

Similarly, another CCA member has had a long-running dispute with a large southern city over unreasonable public ROW access fees. The city at issue has attempted to charge a

[34] Mobilitie Petition at 24-31.

seemingly desultory yearly fee for public ROW access on a "per foot" basis. This regional carrier entered into litigation over the matter in 2014, which has since stalled, and so has fiber deployment to this area. This example illustrates why imprudent fees that bear no relationship to the actual public ROW access, and the clunky litigation remedy on which competitive carriers must often rely, hurts universal coverage and deployment of competitive broadband service and, in turn, economic and job growth. Even though this member's case against the city seems strong, other deployment projects leave little time and resources for resolving this conflict. As a result, the city and its residents may not benefit from new broadband capabilities, a disappointing but likely common prospect across other cities with similar policies demanding arbitrary fees.

Pole attachment fees are another distinct area of concern. For instance, one member reports that Chicago, San Francisco and New York City all charge escalating annual municipal pole attachment fees starting from $4,000 per pole, per year. This cost does not accurately reflect the cost of review and maintenance expenses, and is much more expensive than the FCC-regulated attachment rate for investor-owned poles, which is generally $240 per pole, per year.[35] Members explain that small cells are more typically deployed on municipal poles inside cities, whereas macrosites are usually deployed on privately-owned, FCC-regulated poles. This means some municipalities are charging carriers around *2500 percent* more in fees to deploy equipment that is one-tenth the size, or smaller. As the Commission has recognized, pole attachment rates play an important role in encouraging deployment,[36] and it is Commission policy to "minimize

[35] *See* 47 U.S.C § 224(e) (describing the "telecom rate formula" for pole attachments); *see* Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 222(f)(1) (affording telecommunications carriers an affirmative right of access to poles owned by investor-owned electric utilities and incumbent local exchange carriers).

[36] *See, e.g., Implementation of Section 222 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, WC Docket No. 07-245, *et al.*, ¶ 20 (WCB 2015) ("We

disincentives to investment, including artificially high pole attachment rates."[37] CCA urges the Commission to act now in this proceeding.

In addition, franchise fees, or fees based on a percentage of an applicant's annual gross revenues, should be deemed "unfair" under Section 253 and therefore unlawful. The Commission notes in the Public Notice that circuit courts have upheld franchise fees, but differ on what kind of fees are "fair and reasonable" or "competitively neutral."[38] This type of fee is typically, if not always, unrelated to the cost of reviewing and issuing a siting permit. Any negotiation over whether a franchise fee is "fair" is necessarily too subjective to be allowed into the siting process. For wireline facilities, some municipality franchise fees are based on a percentage of "video revenue" derived from customers within the respective municipality. These fees also discourage deployment, as some carriers will, as a rule, refuse to pay a gross annual revenue fee and, therefore, will not deploy services in such areas. Rather than fuel scattered debate between circuit courts, the Commission should issue a blanket statement disallowing franchise fees, easing uncertainty and speculation. This is a reasonable outcome for competitive carriers as well as states and localities, as Mobiltie's request would still allow local and state authorities to charge ongoing fees, provided they are tied to actual review and maintenance costs,

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recognize that pole rental rates are but one of many considerations underlying marketplace deployment decisions. . . Lower pole rental rates serve to encourage broadband investment").

[37] *Id.*

[38] *See* Public Notice at 13 ("In *TCG Detroit v. City of Dearborn*, the Sixth Circuit determined that a 4% gross revenue fee was fair and reasonable based on the amount of the use contemplated, the amount other providers would be willing to pay, and the impact on the profitability of the business. But we note that in *TCG New York, Inc. v. City of White Plains*, the Second Circuit held that the city could not require the provider to pay a franchise fee equal to five percent of its gross revenue because that fee did not apply to the incumbent provider").

but also limit the fees that are unlawful and unreasonable. Mobilitie's proposal achieves a common sense middle ground while encouraging deployment activity and investment.

B. The Commission Should Clarify the Meaning of "Nondiscriminatory" Fees To Prevent Unreasonable Discrimination Among Broadband Providers.

The FCC should interpret "competitively neutral and nondiscriminatory" fees in Section 253 to mean that charges imposed on one provider for access to ROWs may not exceed the charges imposed on other providers, especially local utility companies for similar access. CCA members report incidents where a local authority uses its discretion to charge members nonsensical fees, seemingly in an effort to drive up the profitability of a particular siting project.[39] Localities should not be permitted to discourage wireless infrastructure investment by extracting larger sums from competitive carriers based on the type of carrier they are as opposed to the cost associated with their use of a site.

C. The Commission Should Require Local and State Authorities to Publish Siting Fees.

The FCC should require localities to publish and make publicly available fees for all siting applicants, including utility companies, by interpreting Section 253(c).[40] At minimum, the Commission should grant Mobiltie's request to require states and local entities to disclose fee

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[39] As an example, in Spotsylvania County, a distributed network company was quoted a $24,000 fee to replace a single wood utility pole in a ROW to install a DAS node, to complete an 11-node network. The Virginia Department of Transportation classified the wooden utility pole (identical to all the others in the ROW) as a "tower" and used a state rule to justify the outrageous attachment fee. Based on past precedent, it is clear that the Virginia Department of Transportation would not have designated the pole as a new tower, and attached a fee, if a utility had applied for the same use of the ROW.

[40] Section 253(c) provides that compensation for the use of ROWs be "publicly disclosed by such government."

schedules upon request, as well as how those charges were calculated, and whether they were one-time or recurring.[41]

IV. THE COMMISSION SHOULD ADOPT A MODEL SITING CODE AND UNDERTAKE EDUCATIONAL EFFORTS TO FACILITATE FASTER NEXT-GENERATION BROADBAND DEPLOYMENT.

Because states' and localities' knowledge and/or implementation of federal infrastructure law and regulations varies significantly throughout the country, CCA supports FCC outreach to states and localities and, consistent with Chairman Pai's Digital Empowerment Agenda, creation of a model code. Developing a model code coupled with educational outreach would help remedy inconsistency both in awareness and implementation. CCA recommends that the Commission educate states and localities on existing federal laws and regulations and the challenges carriers face when attempting to deploy broadband infrastructure. In addition, the Commission should make clear the economic consequences of delay. In members' experience many towns and cities, especially smaller localities, are not aware of and do not implement infrastructure-related federal laws and regulations. This makes deployment permitting between localities unpredictable and unduly burdensome, which causes confusion and delay. Technology delay is technology denial.

A. An FCC-Sanctioned Model Code Will Assist Deployment Efforts.

CCA supports development of an FCC-sponsored model code, consistent with the Digital Empowerment Agenda, and contemporaneous FCC-led outreach to state legislative bodies and localities.[42] A standardized model code will facilitate productive broadband deployment,

[41] Mobilitie Petition at 34-35.

[42] Drafting and adopting a model code would be an appropriate task for the newly-formed Broadband Development Advisory Committee ("BDAC"). The BDAC will likely comprise a diverse group of stakeholders, and therefore is well-equipped to draft a model code appealing to both competitive carriers and communities.

particularly with respect to small cell and DAS policies. Project delays are often caused because a locality does not have a thoughtfully-drafted "agreement" or set of rules in place governing review of siting applications. In some cases, the only pain point is absence of a small cell and DAS policy.

An FCC-approved model code serving as a national guidepost may help to create consistency among states and localities, benefitting both urban and rural areas. For example, some tech-friendly cities, like Austin, Texas, are in the midst of a major overhaul of their policy toward small cell and DAS deployment. The detailed approach may serve Austin well in the long run, but in the interim, delays continue to hamper deployment. As another example, the town of Leesburg, Virginia, has been "in the process" of revising their zoning ordinance to facilitate small cell deployment for over two years. It is slow going, at best, and competitive carriers have received pushback about site proliferation in residential areas. Now, the town is using pending legislation as another excuse to delay.

A model code would promote consistency among localities, preventing disruptions and added administrative burdens arising from "patchwork" policies. To that end, CCA members urge the Commission to engage with state legislative bodies, while developing the model code and more significantly once it is developed. CCA members describe the cost and timing increases for deployment projects in states with many small counties, as each county can have different siting rules. Even if a carrier is successful with one county or locality, it is frustrating and resource-intensive to "start over" time and time again in each new jurisdiction. Competitive carriers and the FCC will save time and resources if state legislative bodies adopt siting policies that localities must then implement.

The model code should incorporate key concepts, such as a definition of "small wireless facility" or "micro" antenna that clearly differentiates small cells and DAS from macrocells. As discussed in Chairman Pai's Digital Empowerment Agenda, any FCC model code should also provide model language for a "dig once" clause for states and municipalities.

B. Educating States and Localities About Broadband Infrastructure Will Help to Streamline Siting Policies.

While a model code is critically important to improving siting processes, educational outreach is equally important and can be tackled immediately. CCA encourages the Commission to perform outreach to states and localities regarding the nature and economic importance of small cell and DAS deployment, as well as why small cells and DAS merit different application review standards than traditional deployments. More broadly, the Commission should brief local and state authorities on the importance of facilitating next-generation broadband service, as well as the nature of 5G, and the economic benefits such services herald for constituents.

CCA members believe that these efforts would be effective in promoting informed policy adoption at both the state and local levels. Today, many carriers develop and distribute informational hand-outs for state and local officials explaining the benefits of small cell deployment and, at the same time, work with state and local legislative bodies to adopt permitting frameworks that facilitate such deployment. These efforts are helpful, but not enough. A federal agency, rather than a commercial party or many commercial parties, is likely to be a more welcome ambassador for new deployments.

The Commission also should play a bigger part in ensuring state and local authorities are familiar with federal infrastructure law and policy. CCA members report that many localities are either unaware of existing law and regulations impacting siting application review and permitting, are indifferent and unwilling to learn, or openly refuse to change noncompliant

policies. In these cases, deployment is significantly delayed and competitive carriers must do the legwork of persuading localities to come into compliance. The Commission would greatly assist competitive carriers simply by making sure current communications law and policy is easily available for localities to access, understand, and implement. Now, carriers are often responsible for briefing local attorneys on the proper legal framework, which has heralded mixed results. CCA members point to uneven understanding and implementation of Section 6409(a) shot clocks in Virginia, for example, where two counties next to one another will implement the statute differently. Where counties do not follow a shot clock to assess whether an application is an "eligible facilities request" under Section 6409(a), applications can putter indefinitely, greatly slowing a project that could significantly benefit the local government and its residents.[43] Deployment is certainly slowed when neighboring counties enforce vastly different administrative procedures. Competitive carriers and consumers desperately need Commission assistance to create a more consistent framework through states and localities.

V. THE COMMISSION SHOULD CLARIFY SECTIONS 253 AND 332 AND SPECIFY CERTAIN ACTIONS THAT VIOLATE THESE LAWS.

While not denying applications outright, many state and local practices unreasonably stall or inhibit broadband siting projects. The Commission should exercise its authority to identify state and local government actions that unlawfully "prohibit or have the effect of prohibiting" an entity's ability to provide "personal wireless services" under Section 332(c)(7)[44] or

[43] Fairfax County, VA, for example, implements Section 6409 effectively, yet many of Virginia's "small counties" do not. Albemarle County, VA, is known to ignore the Section 6409(a) shot clock.

[44] 47 U.S.C. § 332(c)(7)(B)(i)(II). *See also* 47 U.S.C. § 332(c)(7)(A) (stating that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities"). Personal wireless

"telecommunications service" under Section 253(a). In doing so, the Commission should again clearly address the meaning of each statute.[45] This clarification is critical to achieving Congress's and the Commission's expressed policy goals.

A. The Commission Should Clarify Key Terms and Statutory Meaning of Sections 253 and 332.

The Commission should clarify critical terms within Sections 253 and 332, and address in detail the meaning of the statutory phrase "prohibit or have the effect of prohibiting" and the demonstration needed to establish that a state or local government's actions have prohibited or had the effect of prohibiting the provision of service for purposes of either Section 253 or 332.[46] To this end, the Commission should clarify that state and local practices that "prohibit or have the effect of prohibiting" include practices beyond those that facially prohibit the provision of new wireless services, and extend to requirements that make siting uneconomic or impractical.[47]

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services are defined as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C)(i). In 2012, Congress indeed curbed state and local authority by enacting Section 6409(a), which requires local or State governments to approve certain types of facilities siting applications "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law . . . ." Spectrum Act § 6409(a)(1), codified at 47 U.S.C. § 1455.

[45] *See City of Arlington v. FCC*, 133 S. Ct. at 1863 (holding that the Commission has authority to issue binding statutory interpretations, which must be accorded *Chevron* deference); *see also Chevron, USA, Inc. v. Natural Resources Defense Council, Inc. et al.*, 467 U.S. 837 (1984). The Fifth Circuit ruled against a party challenging the Commission's authority to issue the 2009 Declaratory Ruling, holding that the Commission properly exercised its statutory authority to interpret these statutes in a declaratory ruling, after according parties notice and an opportunity to comment. *See City of Arlington v. FCC*, 668 F.3d at 29-39.

[46] 47 U.S.C. § 332(c)(7)(B)(i)(II); *id.* § 253(a).

[47] A declaratory ruling based on record evidence is the proper way for the Commission to make clear its earlier ruling on this topic stands, and necessary considering the courts have since departed from the Commission's 1997 Order establishing that relief under Section 253 does not require the *actual* prohibition of service by a state or local regulation. Members note that some courts have since opted to follow an "actual" prohibition framework, despite the FCC's assertion

As indicated in the Public Notice, the Commission has not yet proposed a more than "basic interpretation" of what kind of local and state barriers might be found to "prohibit or have the effect of prohibiting" service.[48] Meanwhile, the First, Fourth, and Seventh Circuit Courts have split with the Second, Third and Ninth Circuit Courts regarding an applicant's burden of proof when seeking relief under either statutory section.[49] For a provider serving customers within varied local and state jurisdictions, which includes most CCA members, patchwork precedents create an unfriendly environment in which to build and innovate. There is robust industry consensus on this point, which is a rarity in today's consolidating communications ecosystem. Thus, the Commission should intervene and issue an interpretation of these statutes as promptly as possible within the confines of this proceeding.

1. Section 253.

Clarifying Section 253, which proscribes state and local government requirements that "prohibit or have the effect of prohibiting" any entity's ability to provide "*any ...telecommunications service*,"[50] will improve access to poles and ROWs, boosting deployment

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that Section 253 has been violated where a local regulation "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *See California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 (1997); *see also Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).

[48] *See* Public Notice at 10.

[49] *See id.* at 10-11.

[50] 47 U.S.C. § 253(a) (emphasis added). State or local governments may manage public ROWs and call for "fair and reasonable compensation" for use of those ROWs, provided compensation is "competitively neutral and nondiscriminatory" and "publicly disclosed." *Id.* § 253(c). The Commission can "preempt the enforcement" of state or local statutes, regulations, or legal

and strengthening competitive carrier networks. First, the Commission should clarify that Section 253's protections extend to wireless. While Section 332 provides specific limitations around the "placement, construction, and modification of personal wireless service facilities," it includes the same general prohibition as found in section 253, barring requirements that "prohibit or have the effect of prohibiting" provision of the relevant services.[51]

Next, the Commission should explain that the term "legal requirement" in Section 253(a)[52] includes unreasonable contractual provisions for access to and use of ROWs; unreasonable terms, and not just statutes, rules or siting decisions may "prohibit" service. In addition, to address a major pain point throughout the communications industry, the Commission should state that trammeling access to *all* "public" ROWs, *including those owned by states and localities*, may have the "effect of prohibiting" valuable communications services. CCA members report that municipal governments often will deny competitive carriers access to municipally-owned ROWs and poles claiming that they are acting in their "proprietary" capacity outside the reach of Section 253.[53] The 2014 Infrastructure Report and Order leaves open the

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requirements that bar competitive carriers, or any provider, from providing telecommunications service. *Id.* § 253(d).

[51] 47 U.S.C. §§ 253(a), 332(c)(7)(B).

[52] "No state or local statute or regulation, or other State or local *legal requirement*, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added).

[53] In the 2014 Infrastructure Report and Order, the Commission concluded that "Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities," or where local governments, "like private property owners," "enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property." 2014 Infrastructure Report and Order ¶ 239. The Commission then stated "this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt 'non regulatory decisions of a state or locality acting in its proprietary capacity,'" declining to

interpretation that not all municipal action regarding public property it "owns" is automatically "proprietary," and, therefore, the Commission should promote widespread deployment by clarifying this language so that municipalities cannot shield themselves from implementing responsible siting policies based on vague language.[54] The Commission can, and should, step in with respect to the meaning of "proprietary".[55]

2. Section 332.

Just as important as Section 253, the Commission also should facilitate streamlined broadband siting review by clarifying the scope of Section 332, which provides a means to challenge "decisions regarding the placement … of personal wireless facilities."[56] Importantly, the Commission should declare that Section 332 applies to all state or local government actions "regarding the placement, modification, and construction" of personal wireless facilities, including wireless facilities in a ROW, and is not restricted to local zoning decisions. Without this clarification, some local governments will continue to ignore Section 332 as applicable to siting requests in ROWs. Parsing the statute in this fashion surely contravenes its intent and, as members report, makes needed deployment more difficult and expensive.

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further elaborate on how this principle should be applied. *Id.* ¶¶ 239-40. This, however, does not stop the Commission from stepping forward now and clarifying that municipal ROWs and any poles within those ROWs are, as public property meant to be used for the public benefit, within the purview of Section 253.

[54] *Id.* ¶¶ 239-40.

[55] *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004).

[56] 47 U.S.C. § 332(c)(7)(A). Section 332 prohibits state and local government actions that "prohibit or have the effect of prohibiting" an entity's ability to provide personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). Section 332 also provides that state and local land-use authorities "shall act" act on wireless siting requests within a "reasonable period of time," *id.* § 332(c)(7)(B)(ii), and they may not "unreasonably discriminate among providers of functionally equivalent services," *id.* § 332(c)(7)(B)(i)(I).

In addition, the Commission should clarify the scope of Section 332(c)(7), which some courts have held does not apply when localities act in their "proprietary" capacity.[57] As discussed above with respect to Section 253, the 2014 Infrastructure Report and Order acknowledges that "judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt 'non regulatory decisions of a state or locality acting in its proprietary capacity,'" but did not clarify how to apply this principle.[58] A more detailed of these concepts is welcome and needed.

Last, the Commission should explain anew when local siting rules can be preempted by Section 332 for "prohibit[ing] or hav[ing] the effect of prohibiting" personal wireless services. Although both Sections 332 and 253 include "the effect of prohibiting" language, competitive carriers find localities will disagree that Section 332 precludes local review of technical or operational justifications for a wireless facility or the type of wireless deployment. Local governments frequently require siting applicants to prove a given site or location—or, the type of facilities, support structures, and supplementary technology—is "needed." Deployment efforts are hurt where siting authorities institutionalize what can be a highly subjective debate over technology or location, often between industry experts and lay persons. There is precedent that technical or operational considerations within a permitting application are preempted by Section

[57] *See, e.g.*, *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 419-21 (2d Cir. 2002); *see also Omnipoint Commc'ns, Inc. v. City of Huntington Beach,.*, 738 F.3d 192, 198-201 (9th Cir. 2013) (The court held that rules dealing with a locality's handling of its own property are outside the purview of Section 332(c)(7) preemption, stating, "[b]y its terms, the TCA applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner."). Such holdings sabotage the meaning of public property, which is meant to serve as locations for important public services like broadband connectivity.

[58] 2014 Infrastructure Report and Order ¶¶ 239-40.

332, but not consensus.[59] Accordingly, the Commission should make clear localities are preempted by Section 332 from implementing such policies.[60]

B. The Commission Should Provide Examples of Practices that "Prohibit or Have the Effect of Prohibiting Service."

The Commission should declare that a practice which will "prohibit or have the effect of prohibiting" broadband deployment includes those that render broadband deployment impractical or uneconomic. The FCC could interpret this statutory language to preempt a practice that, like a number overly-stringent local rules, does not actually prohibit service, yet has the effect of prohibiting service by rendering impracticable applications for relatively unobtrusive infrastructure even where the deployment is unlikely to cause adverse effects or materially disturb the surrounding area. As a result, the speed of broadband deployment in certain areas is slowed, stopped, or members are forced to simply avoid deployment on certain structures or in certain areas.

A practice that will "prohibit or have the effect of prohibiting" broadband deployment should be interpreted to provide relief for carriers confronting an overly-narrow local definition of "small antenna" rendering service "impractical" or "uneconomic." Presently, carriers are frequently forced to delay or reconsider deployment when local provisions classify true small cells and DAS as macrocells. For example, under Anchorage's municipal code, the higher an antenna is located on a pole, the larger its footprint is considered; this rule is ill-suited for regulating small cell deployments and collocations. The Municipality of Anchorage's code

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[59] *See, e.g., N.Y. SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97, 105-06 (2nd Cir. 2010); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000).

[60] The argument here parallels those made above with respect to § 253. The Commission should, accordingly, declare that both statutes operate to preempt practices beyond those that "actually" prohibit wireless broadband service.

governing small cell deployment on a pole or ROW also makes deployment impractical; the code defines macro and micro cells so that a "small cell" is treated like a microcell, and hence subject to more stringent deployment rules. In Anchorage, a large "macro" antenna is any antenna with a volume greater than three cubic feet; small "micro" antennas are described as those under three cubic feet, specifically delineating inclusion of small cell and DAS technology.[61] Contrast Anchorage's policies with those recently adopted in Ohio. Ohio Senate Bill 311[62] amends Section 4939.01 of the Ohio Revised Code to include a robust definition of "Small Wireless Facilities": antennas not greater than 6 cubic feet in volume, associated equipment not more than 28 cubic feet in volume (excluding several specified items, such as electric meters and concealment elements), and that do not increase the height of the supporting structure more than 10 feet or a total resulting height of 50 feet.[63] One member has experienced similar issues in Albemarle County, VA, which subjects siting antennas with dimensions exceeding 1400 square inches per antenna to "Special Exception" approval, which introduces the undesirable prospect of two public hearings.[64]

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[61] Anchorage, Title 21 Chapter 21.05.040 8.3(e), (f).

[62] *See* S. BSB. 331, 131 § 4939.01(N), *available at* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-SB-331.

[63] *Id.*

[64] Similarly, the "stand-off" limitations adopted by Albemarle County, VA, have hurt deployment. The County rule in effect limits by 12 inches the distance from the back of an antenna or radio head to the face of the pole, and only three flush-mounted antennas are allowed at a carrier's antenna RAD center—the height at which an applicant is permitted to deploy on a structure. Stacked remote radio heads, a remote radio transceiver that connects to an operator radio control panel via electrical or wireless interface, must be placed below the antenna RAD center. If that cannot be accomplished, carriers are forced to request a second RAD center which results in paying additional rent costs. In that same county, for wood-to-steel tower replacements, applicants are required to meet a 1-to-1 property boundary setback or obtain a fall zone easement from the adjacent property owner. Albemarle County has made progress by allowing exempt collocation applications for LTE upgrades and tower replacements; however,

Additionally, any moratoria should be deemed to "prohibit" or "have the effect of prohibiting" deployment. In 2014, the Commission addressed problematic moratoria, yet held only that moratoria do not toll the running of the Section 332 shot clocks.[65] The Commission concluded that the fact that "an applicant can seek redress in court even when a jurisdiction has imposed a moratorium, will prevent indefinite and unreasonable delay of an applicant's ability to bring suit." Yet CCA members explain that pursuing redress in court will often only result in the indefinite delays the Commission sought to prevent.[66] In light of competitive carriers' next generation deployments and densification projects underway, CCA urges the Commission to consider prohibiting all moratoria on wireless siting applications, and examine the legality of moratoria under Sections 253 and 332. Indeed, moratoria are a frequent, frustrating obstacle for

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applicants must meet many additional size, stand-off and height limitations to gain this type of approval. In Prince William County and Albemarle County, members report county siting authorities attempt to evade § 6409(a) by inserting conditions into the approval of applications requiring the applicant to reduce the structure height by 20 feet or 10 percent so that applicants cannot actually take advantage of allowable height increases under § 6409(a) to get the actual needed height. This will ultimately result in applicants strategically asking for 10 percent or 20 feet more than needed in anticipation of a county requirement to decrease the structure's height. *See* Albemarle County Code, Zoning Supplement #92, § 5.1.40, available at http://www.albemarle.org/upload/images/Forms_Center/Departments/County_Attorney/Forms/Albemarle_County_Code_Ch18_Zoning05_Supplement_Regulations.pdf. In 2014, the Commission clarified that § 6409(a) does not apply where "…a modification substantially changes the physical dimensions of a tower or base station if it meets any of the following criteria: (1) for towers outside of public rights-of-way, it increases the height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for those towers in the rights-of-way and for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater." 2014 Infrastructure Report and Order ¶ 188. The FCC also held that "a modification to a non-tower structure that would increase the structure's height by more than 10% or 10 feet, whichever is greater, constitutes a substantial change under Section 6409(a)." *Id.* ¶ 193.

[65] *2014 Infrastructure Report and Order* ¶ 265.

[66] *Id.*

competitive carriers seeking to deploy consumer demanded next-generation services. For example, a 2015 moratorium on wireless siting applications in Alpharetta, GA lasted for over a year. The City of Alpharetta described the moratorium as merely a means to update the city's ordinances, but it was unnecessarily extended time and time again.[67] At least one CCA member elected to withdraw its siting application and collocate in a neighboring city, and in a location less desirable and conducive to providing wireless service. This member acknowledges that it likely will eventually return to deploy in Alpharetta, despite the cost. Consumer desire demands it, but in the meanwhile optimized service is delayed.

Another member cites imposed moratoria in Austin and McAllen, Texas as a source of delay. The moratoria for each city officially began in 2016, but city officials ceased contact with CCA members during the time when the moratoria were prepared. This unfortunate development resulted in wasted time and resources. The following is an non-exhaustive list of moratoria currently known to be in effect, by state: California (Fresno County);[68] Ohio (City of

[67] *See, e.g.*, Jonathan Copsey, *Alpharetta extends cell tower, signage bans*, JOHNS CREEK HERALD (Aug. 18, 2015), http://northfulton.com/stories/Alpharetta-extends-cell-tower-signage-bans,78618.

[68] Marc Benjamin, *Fresno County Adopts Moratorium on Cellphone Towers*, FRESNO BEE (Nov. 21, 2016), http://www.techwire.net/legislation/fresno-county-adopts-moratorium-on-cellphone-towers.html.

Painesville,[69] City of Mentor on the Lake,[70] City of North Royalton[71]); Washington (City of Camas[72]); Texas (City of Austin,[73] City of Rockport[74]); Florida (City of Tallahassee,[75] City of

[69] *See* Resolution No. 22-16, *A Resolution Authorizing and Directing the City Manager to Submit an Application and Enter Into an Agreement with the Ohio Public Works Commission for Funding Infrastructure Improvements of Walnut Street, and Declaring an Emergency*, Council of the City of Painesville (Sept. 19, 2016), http://www.painesville.com/vertical/sites/%7B66FDE066-2B9A-43E2-8DFC-2129003D50A7%7D/uploads/Legislation_for_9.19.2016_-_Action_Taken(2).pdf.

[70] *See* Ordinance No. 2016-0-27, *An Ordinance to Impose a Temporary Moratorium Upon the Approval of Any Application for Construction of an/or Modifications to Facilities Within the Rights-Of-Way of the City of Mentor on the Lake Until 145 Days After the Effective Date of This Ordinance, and Declaring an Emergency*, http://www.citymol.org/assets/2016-O-27.pdf.

[71] *See* Bob Sandrick, *North Royalton extends moratorium on new wireless communication towers, antennas and equipment*, CLEVELAND.COM (Jan. 10, 2017), http://www.cleveland.com/north-royalton/index.ssf/2017/01/north_royalton_extends_morator.html.

[72] *See* Heather Acheson, Camas City Council implements cell tower moratorium, CAMAS POST-RECORD (Sept. 6, 2016), http://www.camaspostrecord.com/news/2016/sep/06/camas-city-council-implements-cell-tower-moratorium/.

[73] *See* Rondella Hawkins, Telecommunications & Regulatory Affairs Officer, *City of Austin Interdepartmental Wireless Task Force Update*, Memorandum (April 13, 2016), http://www.austintexas.gov/edims/document.cfm?id=251960.

[74] *See* City of Rockport Minutes, City Council Regular Meeting (Sept. 27, 2016), http://cityofrockport.com/DocumentCenter/View/12901.

[75] *See* Jessica M. Icerman, Cell Tower Right-of-Way Task Force, *Temporary Moratorium on Placement of Wireless Communication Towers and Facilities in Public Rights-of-Way*, Memorandum (Oct. 18, 2016), http://fl-counties.com/themes/bootstrap_subtheme/sitefinity/documents/memo-re-cell-tower-row-moratorium.pdf.

Fort Lauderdale,[76] City of Boynton Beach[77]). The Commission's public interest mandate is not served when cities regularly use moratoria as an indefinite stall tactic.

Local and state entity requirements rendering a project "uneconomic" and therefore ones that "effectively prohibit" deployment should include requirements that arbitrarily raise project costs.[78] In one salient example from 2016, a competitive carrier laying fiber fought a state Department of Transportation ("DOT") attempt to revise a requirement for underground utility permitting, which would substantially increase the cost and time required to prepare permit applications for public ROW access along state and federal highways. This state DOT attempted to implement a requirement that all permits contain a survey certified by a professional engineer or licensed surveyor, a rare if not unique rule. The new requirements were a substantial departure from prior requirements, and the DOT made matters worse by simultaneously refusing to review pending ROW work permits. The rules were burdensome and ultimately unhelpful, increasing the cost of engineering any fiber optic installation in the DOT-controlled ROW by nearly 1,000 percent, without improving location data accuracy. This CCA member explained that, had the new requirements been in place in 2014, costs for a 430-mile fiber optic build would have skyrocketed by $6.5 million; rendering the project uneconomical.[79] The

[76] City of Fort Lauderdale, Resolution 16-0648, https://fortlauderdale.legistar.com/LegislationDetail.aspx?ID=2739803&GUID=77C03F62-DE4B-4A17-98F9-5C01F8298B10&Options=&Search=.

[77] Alexandra Seltzer, City issues moratorium on new cell towers, PALM BEACH POST (Nov. 21, 2016), http://www.mypalmbeachpost.com/news/local/city-issues-moratorium-new-cell-towers/bQCOw0PXcaPQrUo2SlxvUN/.

[78] This is especially the case where state departments do not follow notice and comment procedures before passing onerous, unprecedented rules.

[79] The DOT described in this example, however, did not implement the rule following pressure from the CCA member seeking to deploy, citing violations of the Administrative Procedures Act.

Commission should clarify that requirements that increase costs dramatically and arbitrarily are "uneconomic" and thus within the category of preempted practices that have the effect of prohibiting broadband deployment.

VI. THE FCC SHOULD ADDRESS OTHER DEPLOYMENT BARRIERS NOT RAISED IN THE PUBLIC NOTICE.

While there exists an inconsistent patchwork of rules and procedures in each state and locality, there are other pressing siting challenges that need to be addressed just as quickly. Infrastructure deployment spans many jurisdictions and bodies of law, some of which—such as the role of Tribal review throughout the siting process—arguably obstruct broadband deployment to a greater extent than state and local review. Accordingly, the FCC should seek comment on a broader siting agenda addressing barriers created by Federal Land- and Property-Managing agencies, Tribal authorities, and areas requiring Congressional action.

A. Section 106 Review Process Reform Is Needed to Achieve Broadband Deployment Objectives.

CCA encourages the Commission to pursue broad reform to the review process siting applicants must undergo per the National Historic Preservation Act.[80] The "Section 106" review process, whereby spectrum licensees and registrants must ensure their actions protect historic lands and properties,[81] is often the biggest culprit in terms of siting project delays and cost. CCA recognizes the challenges inherent in addressing the full range of Section 106 review issues—the

[80] 54 U.S.C. 306108.

[81] The FCC's definition of "Historic Property" includes "[a]ny prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. . . The term includes properties of traditional religious and cultural importance to an Indian tribe . . . that meet the National Register criteria." *See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd. 1073 (rel. Sep. 9, 2004), *aff'd CTIA v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) ("2004 NPA").

ambiguous delegation of authority between agencies, the toothless deadlines, the regulatory silence with respect to fees. Since the Advisory Council on Historic Preservation ("ACHP") approved in 2000 the Commission's decision to delegate to applicants the authority to conduct Section 106 review, the Commission has made appreciable efforts to streamline the Section 106 review process through a series of National Programmatic Agreements ("NPAs").[82] This process required a great deal of interagency diplomacy and negotiation with Tribal parties endowed with unique national standing and rights. Nonetheless, the collective effect of the NPAs, the ACHP's statutory implementation of the NHPA in Section 800,[83] the NHPA itself, and confusing local practices create an unsustainable regulatory environment where competitive carriers and other siting applicants see projects delayed for years at the behest of reviewing parties with tenuous claims to the site at issue. The Commission should work collaboratively with Tribes, state historical preservation offices, and other parties involved in Section 106 review to address these issues. Below, CCA offers a few suggestions on how to reform the Section 106 process.

1. Limiting the scope of a "federal undertaking."

The Commission should revisit its determination that all facilities siting is a federal undertaking.[84] Currently, the Commission considers the construction of any communication tower of any height or the collocation of communications equipment using FCC-licensed

[82] *See* 2004 NPA; *see also see also Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, DA 16-900, WT Docket No. 15-180 (rel. Aug. 8, 2016) ("2016 NPA"); 47 C.F.R. pt. 1 app. B; *see also Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures*, Public Notice, 16 FCC Rcd. 5574 (WT 2001).

[83] 36 C.F.R. § 800.

[84] 54 U.S.C. 306108.

spectrum a "federal undertaking" and, therefore, must undergo Section 106 review. But this interpretation is overbroad and not compelled by the statutory definition of federal undertaking.

Small cell and DAS deployments have a negligible effect on historic properties,[85] due in large part to their unobtrusive physical stature and appearance. Appropriately limiting what is considered a "federal undertaking" would boost competition among and between different types of carriers offering broadband services. As Verizon pointed out in its 2016 Biennial Review comments,[86] unlicensed spectrum users are not required to undergo, and therefore avoid the substantial cost and delays of, historic preservation reviews before constructing wireless facilities. Nor do NHPA rules apply to the construction of utility poles used to carry electricity or wireline communications, even where such poles are the same size and type as those used for small antenna installations. Accordingly, the Commission should look to address these barriers, possibly in parallel with legislative solutions to achieve the best, most certain outcome.

2. National Programmatic Agreements.

The Commission can also help with small cell and DAS deployment issues by amending the NPA[87] to exclude more uniformly small cells and DAS in all areas from Section 106 review. In June 2015, CCA filed comments on the draft NPA to govern Section 106 review for DAS and

[85] The Commission concluded as far back as 2014 that "[DAS] networks and other small-cell systems use components that are a fraction of the size of macrocell deployments, and can be installed—with little or no impact—on utility poles, buildings, and other existing structures." 2014 Infrastructure Report and Order ¶ 3.

[86] *See 2016 Biennial Review of Telecommunications Regulations*, Comments of Verizon, IB Docket No. 16-131, ET Docket No. 16-127, PS Docket No. 16-128, WT Docket No. 16-138, WC Docket No. 16-132 at 6-7 (filed Dec. 5, 2016).

[87] The NPA partially replaces the rules promulgated by the ACHP so long as the rules are consistent with the AHCP's regulations. 36 C.F.R. § 800.14.

small cells.[88] We asked for many modifications to the draft, but very little changed between the draft and the final, executed 2016 NPA. We urge the Commission to refine the NPAs to ensure the Section 106 process does not stymie much-needed deployment, while ensuring the requirements of the Historic Preservation Act are honored.

3. Section 106 Working Group.

Broadband deployment on federal lands presents unique issues with which the Commission is already involved, as Chairman Pai recognizes.[89] The Commission should continue work with the Section 106 Working Group created by Executive Order 13616.[90] The Section 106 Working Group recently released a draft Program Comment seeking to simplify Section 106 review of siting applications on federally-owned and managed lands and structures.[91] The draft Program Comment, if adopted in the form distributed for stakeholder

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[88] *See Wireless Telecommunications Bureau Seeks Comment on Proposed Amended Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Comments of CCA, WT Docket No. 15-180 (filed June 27, 2016).

[89] *See The Future of Mobile Broadband in the Americas: LTE to 5G Network Innovation*, Remarks of Commissioner Pai, 3-4 (rel. Nov. 5, 2015) ("the federal government owns roughly 30% of all land in the U.S., and right now it takes four years, on average, for providers to successfully site wireless infrastructure on federal land—far longer than it does to locate facilities on private property").

[90] *See* Exec. Order No. 13616, 3 C.F.R. 13616 (2012) ("Executive Order 13616"). Executive Order 13616 is premised on the idea that "decisions on access to Federal property and [rights-of-way] can be essential to the deployment of both wired and wireless broadband infrastructure." The "Broadband Deployment on Federal Property Working Group" was created by Executive Order 13616 to develop "a coordinated and consistent approach in implementing agency procedures, requirements, and policies related to access to Federal lands, buildings, and [rights-of-way], federally assisted highways, and tribal lands to advance broadband deployment." *Id.*

[91] *See ACHP Extends Comment Period on Proposed Broadband on Federal Property Program Comment* (rel. Feb 17, 2017), http://www.achp.gov/broadband.html*; see also Draft Program Comment for Telecommunications Projects on Federal Property* (Jan. 13, 2017), http://www.achp.gov/docs/Telecommunications%20Projects.pdf.

review, will streamline deployment on federal lands, particularly with respect to fiber deployment. As CCA noted in its comments to the draft Program Comment, the draft suffers from many of the same deficiencies raised above with respect to state and local siting approvals.[92] CCA members can attest that projects on federal lands can be mired in delay and unpredictable expenses result from no fee constraints or application review timelines.[93] CCA members deploying in rural areas often try to avoid deploying on federal lands altogether, while members in urban areas often face difficulty deploying near or on federal buildings and landmarks. Accordingly, CCA urges the Commission to remain involved and continue to press for changes to the Program Comment that will help address deployment issues on Federal lands.

4. Streamline Tribal Authority to Control Siting Projects.

The Section 106 Tribal review and consultation process is a material impediment to broadband deployment. In carrying out the Section 106 review process, federal agencies must, for federal undertakings outside Tribal lands, consult with Tribes that attach religious and cultural significance to historic properties affected by an undertaking. Carriers are delegated the responsibility for identifying and evaluating historic properties and assessing the effects of the proposed facilities, which includes identification of and consultation with Tribal Nations that have expressed an interest in the project. CCA recognizes this is an important process.

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[92] *See* Comments of Competitive Carriers Association, *Draft Program Comment for Telecommunications Projects on Federal Property*, 2-4 (filed Feb. 3, 2017), *available at* http://www.achp.gov/docs/Broadband%20PC%20comments%202%20of%203.pdf.

[93] *See, e.g.*, Ex Parte Letter from Tim Stelzig, Counsel for General Communication, Inc, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 13-328, *et al.* (filed Mar. 4, 2015) (noting that "U.S. federal government's restrictions on land use and its stringent permitting requirements raise GCI's costs sufficiently that it undermines the business case and prevents GCI from deploying infrastructure it otherwise would bring to market," and urging inter-agency coordination, especially designation of a lead agency for permitting processes).

Nevertheless, CCA emphasizes the need to introduce practical and reasonable limitations on Tribal review.

Tribal review often results in protracted delays and shocking costs, many seemingly unrelated to the actual cost of review or the presence of tribal property. The FCC, as the lead agency for Tribal relations for siting issues, should address the barriers to infrastructure deployment caused by unreasonable Tribal review processes under Section 106 and adopt changes to address those barriers.

First, the Commission could clarify what fees are appropriate or necessary to fulfill carriers' duty to consult with Tribal Nations. The ACHP issued guidance in 2001 ("*2001 ACHP Guidance*") stating that siting applicants who assume a federal agency's Section 106 duties, as carriers do, are obligated to consult with Tribes from initial scoping through the resolution of any adverse effects, but "[i]f an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant *may refuse and move forward*."[94] The guidance further provides that payment is appropriate when a siting applicant "seeks information or documentation that it would normally obtain from a professional contractor or consultant."[95] This guidance is out of step with CCA members' experiences. For example, one CCA member reports that for approximately 20,000 sites for which it used the Tower Construction Notification System ("TCNS") since 2004,[96] it did not encounter a single instance where a Tribe requested

[94] *See* John Fowler, ACHP Executive Director, *Fees in the Section 106 Review Process*, Memorandum, 3 (July 6, 2001) (emphasis added) ("*2001 ACHP Guidance*"), *available at*: http://www.achp.gov/feesin106.pdf.

[95] *Id.*

[96] The TCNS was created by the FCC in 2004 and is used to notify Tribal Nations, Native Hawaiian Organizations ("NHOs") and state historic preservation officers ("SHPOs") of proposed tower constructions or antenna structure installations in areas of interest designated by

substantive consultation under the NPA where the tribe identified a Historic Property interest[97] that might be implicated by the application for pending tower or antenna installation. The Commission should work with Tribes and industry stakeholders to ensure Tribal fees are appropriately assessed, and more closely tied to reimbursing Tribes where carriers need, as suggested in the guidance, "information or documentation that it would normally obtain from a professional contractor or consultant." The FCC should also clarify when, and in what amount, Tribal fees are "reasonable," perhaps drawing upon Mobilitie's request that siting fees be tied to actual costs of review.

The Commission should optimize TCNS by allowing applicants to view locations where there are, generally, areas of Tribal interest. CCA members have expressed an interest in adjusting deployment plans to avoid areas with Tribal interest, and thereby avoiding at least initial Section 106 review altogether. This is not currently possible, as siting applicants find out whether a proposed tower or antenna implicates a Tribal interest only after notice is delivered to Tribes on TCNS or other means. Even though CCA members are aware many Tribes, especially historically nomadic Tribes, have interests in multiple areas (possibly spanning several states, or more), members also note many locations where Tribes assert authority that are seemingly

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the recipients. Tribes, NHOs and SHPOs can respond through TCNS directly to siting applicants. *See* Tower Construction Notifications, FCC, http://wireless.fcc.gov/outreach/index.htm?job=tower_notification; *see also FCC Announces Voluntary Tower Construction Notification System to Provide Indian Tribes, Native Hawaiian Organizations, and State Historic Preservation Officers with Early Notification of Proposed Tower Sites*, Public Notice (rel. Feb. 3, 2004).

[97] Historic Property is defined as "[a]ny prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register criteria." *2004 NPA*, Appendix B § II.A.9.

unrelated to any actual area of cultural significance (*e.g.*, on already-disturbed ground atop a skyscraper in Chicago or New York, or an old parking lot). CCA urges the Commission to explore opportunities to streamline reviews (or avoid review obligations altogether) in such locations. For example, the Commission could create and maintain an informational portal that identifies Tribes' ancestral territories, to contextualize any initial claims of interest in the Section 106 review process. Further, the Commission should institute a reasonable "shot clock" wherein Tribes may declare an interest in consulting. The Commission could consider extending the "shot clocks" established in the *2005 Declaratory Ruling* to other occasions when Tribes do not respond to siting applicants.[98]

[98] Under the NPA, siting applicants must undertake "initial attempts" to contact Tribes. "Applicants may fulfill their obligation to ensure that initial contacts are made with potentially affected Indian tribes and NHOs either by using TCNS, which will automatically make the initial contacts on behalf of the Commission, or by making contact independently pursuant to a pre-existing relationship . . . [but] the initial contact does not itself constitute or stand in the place of Section 106 consultation." *Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations Under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 16092, ¶¶ 3-4 (2005). If a Tribe requests consultation, a carrier applicant must refer that request to the FCC, and if the Tribe indicates historic property may be disturbed by a project, the siting applicant is required to invite the Tribe to join the Section 106 process as a consulting party. An applicant must seek Commission guidance if a Tribe fails to respond to inquiries. This results in significant delays. *See id.* ¶¶ 2-3. If a Tribe does not respond to an initial contact attempt within "30 days," applicants are instructed to "attempt a second contact in a manner reasonably calculated to elicit a response." *Id.* ¶ 7. If the Tribe does not respond within "10 calendar days," the applicant must raise the issue with the Commission for "guidance." *Id.* Then, the Commission will attempt to contact the Tribe, which begins a 20-day response deadline, after which the applicant's "pre-construction obligations" under the NPA are discharged. *Id.* ¶ 8. Nonetheless, "[a]n Indian tribe's or NHO's failure to express interest in participating in pre-construction review of an undertaking does not necessarily mean it is not interested in archeological properties or human remains that may inadvertently be discovered during construction. Accordingly, an Applicant is still required to notify any potentially affected Indian tribe or NHO of any such finds pursuant to Section IX [of the *2004 NPA*] or other applicable law." *Id.* ¶ 11.

As part of this effort, the Commission should look for opportunities to bolster Tribal technological resources and capabilities. CCA Tribal carrier and affiliate members explain that many Tribes do not have reliable technological resources, which can make the Section 106 review process difficult and limit Tribal ability to participate in new deployments. Further, the varied nature of Tribal government structures between the 566 federally-recognized Tribes may mean knowledge and contact persons turn over frequently. For example, one of CCA's Tribal affiliate member's government changes every two years, which can be disruptive in terms of Section 106 review participation. Nonetheless, CCA understands some Tribes are making efforts to create waivers under which a Tribe or many Tribes delegates consulting power to one Tribe or tribal historic preservation officer ("THPO"). CCA encourages the Commission to explore how this approach might be applied on a wider regional basis to streamline Section 106 review. Perhaps the FCC could draft comprehensive siting review guidelines that any Tribe could consider, amend, and adopt.

More broadly, CCA members with tribal interests voiced a need for more information and FCC outreach to clarify the Section 106 rules and procedures, and broadband benefits. Tribes also have questions regarding when fees are appropriate, and the exact parameters of required consultation. Ideally, the Commission will work collaboratively with industry and Tribal nations to develop rules that respect Tribes' government structure, ancestral grounds and property, without casting undue uncertainly on the deployment process.

Considering the importance of broadband deployment and the potential for compromise, CCA encourages the Commission to work collaboratively with industry, Tribes, the ACHP, and Congress to develop a commonsense path forward for siting permit review.

B. The Commission Should Streamline Mandatory Environmental Review.

The Commission should also refine the process for environmental review under the National Environmental Protection Act.[99] Members have an interest in expanding the narrow category of structures excluded from mandatory environmental review, revisiting rules related to floodplains, as well as creating timelines and dispute resolution mechanisms within the rules governing EAs.

VII. CONCLUSION

The Commission must facilitate a regulatory environment that supports advanced mobile service deployment to ensure that broadband deployment goals and consumer demands are met. To achieve these goals, CCA encourages the Commission to grant the Mobilitie Petition and embrace the additional proposals discussed herein.

Respectfully submitted,

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[99] *See* 42 U.S.C. §§ 4321, *et seq.*